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In the

Supreme Court of the United States

OCTOBER TERM, 1964

STANLEY JACHIMIEC, individually and on behalf of all other similarly situated shareholders of SCHENLEY INDUSTRIES, INC.,

Petitioner,

vs.

SCHENLEY INDUSTRIES, INC., a corporation, W.E. BLAKELEY, E. R. DEUTSCHE, THEODORE GOMMI, MILO B. HOPKINS, P. E. LOCKWOOD, JOHN MACKIE, E. S. MONOHAN, J. LINCOLN MORRIS, MILTON J. NAUHEIM, L. B. NICHOLS, LEWIS S. ROSENSTIEL, A. D. SCHULTE, R. G. SMITH and THEODORE C. WIEHE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on February 26, 1965.

OPINIONS BELOW.

Neither the District Court nor the Court of Appeals wrote an opinion. However, the judgment of the Court

of Appeals entered on February 26, 1965 sets forth the basis of the Court's decision and is reproduced in Appendix A hereto, *infra*, pp. 1a, 2a.

JURISDICTION.

An Emergency Petition for Rehearing was denied by the Court of Appeals on March 4, 1964 (Appendix C hereto, *infra* p. 19a).

Jurisdiction of this Court is invoked under Title 28 U.S. Code, Section 1254(1).

QUESTIONS PRESENTED.

1. Do shareholders who are solicited to tender their stock to the issuing corporation, but who decline to tender in the absence of full disclosure of the material facts, have standing to sue to enjoin consummation of the corporation's invitation for tenders on the ground that the invitation violates Rule 10(b)-5 under the Securities Exchange Act of 1934, which prohibits false and misleading statements "in connection with the purchase" of any security?

2. When a corporation's "Invitation for Tenders," by which it proposes to acquire $32,000,000 of its own stock, is challenged under Rule 10(b)-5 as false and misleading, can a reviewing court determine merely by looking at the face of such document that there has been no violation of Rule 10(b)-5?

STATUTES AND REGULATIONS INVOLVED.

The Securities Exchange Act of 1934, as amended, Section 10(b) [15 U.S.C. Sec. 78j (b), 48 Stat. 891]:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10(b)-5 of the Securities and Exchange Commission, promulgated pursuant to Section 10(b) of the Securities Exchange Act of 1934, as amended (17 C.F.R. §240.10b-5):

"It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security."

STATEMENT OF THE CASE.

The Court of Appeals for the Seventh Circuit dismissed plaintiff's Complaint and dissolved an order of the District Court for the Northern District of Illinois prohibiting completion of an invitation for stock tenders of Schenley Industries, Inc. The Court of Appeals held that plaintiff, on behalf of himself and other shareholders similarly situated, had no standing to complain that the invitation for tenders was false and misleading in violation of Rule 10(b)-5 under the Securities Exchange Act of 1934 since plaintiff had not tendered his shares and since in any event, on its face, the invitation for tenders was sufficient.

The Facts.

Plaintiff Stanley Jachimiec (herein "Petitioner") has been a shareholder since 1954 of Respondent Schenley Industries, Inc. (herein "Schenley" or "the corporation"), and owns over 500 shares of the corporation's common stock. (Appendix B hereto, *infra*, pp. 3a, 4a) Schenley is a Delaware corporation with its principal place of business in New York, New York. It produces and sells whiskies, wines, spirits and pharmaceuticals throughout the United States and many foreign countries. In January of 1965 it had outstanding approximately 6,000,000 shares of common stock, listed and traded on the New York Stock Exchange and widely distributed among members of the investing public. (Appendix B hereto, *infra*, p. 4a)

On or about January 28, 1965, Schenley mailed to its many thousands of shareholders an offer to purchase one million shares of its outstanding common stock at $32 per share. The offer was set forth in a one-page communica-

tion captioned "Invitation for Tenders" (Appendix B hereto, *infra*, p. 18a).[1]

Apart from several paragraphs devoted to a description of this offer and to the mechanics of accepting the offer, the information provided was limited to four items.

(1) A table was presented reflecting the price range of the corporation's common stock on the New York Stock Exchange, indicating that the price for many months had ranged in the lower or middle 20's and was currently approximately $27 (in contrast to the tender price of $32).

(2) Reference was made to the fact that financial statements had been transmitted previously to the shareholders; an offer was made to furnish such statements on request. In addition it was stated that in the four months ended December 4, 1964, compared with the similar 1963 period there had been a slight increase in consolidated sales and an increase in earnings per share from 54¢ to 92¢, exclusive of the corporation's interest in a recently acquired company.

(3) A statement was made that "[t]his Invitation is not open to any officer or director of the Company or his 'associates' as defined in Rules and Regulations of the Securities and Exchange Commission under the Securities Exchange Act of 1934."

(4) The Invitation stated that approaches ("not definitive as to price, or otherwise") had been made to certain major shareholders "indicating an interest in the purchase of their shares."

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[1] Because the Court of Appeals took the appeal as an emergency matter no portions of the record were printed. For the convenience of the Court the Complaint is reproduced as Appendix B hereto, *infra* pp. 3a-18a, and the Invitation for Tenders, a copy of which was annexed to the Complaint, is reproduced as part of Appendix B, *infra*, p. 18a.

From the information furnished, Petitioner was unable to make a reasonably informed judgment as to whether or not it was advisable for him, or others similarly situated, to accept the Invitation. Indeed, although not shown in the record, Petitioner, a trained accountant by profession, did research in Moody's Industrial Manual and also obtained copies of the financial statements of the corporation referred to in the Invitation. Nevertheless, Petitioner was still not in a position to make an informed judgment.

There were indications, however, that the price of $32 per share, although approximately $5 over the current market price, was probably too low. The August 31, 1964 balance sheet of the corporation indicated that the book value of the common stock was in excess of $44 per share. Moreover, the fact that the insiders were not tendering any of their own shares and that "approaches" had been made to major shareholders (of sufficient substance that the corporation felt compelled to make some statement about the matter) constituted a further warning signal.

To Petitioner it seemed neither appropriate nor reasonably required of him to base his investment judgment on speculation or suspicion (which might prove unjustified) as to the motives of management. Petitioner desired and sought, for himself and others similarly situated, complete information setting forth the reasons which, from the corporation's point of view, would make the acquisition of a million of its outstanding shares beneficial and desirable and which, correspondingly, would indicate whether from the point of view of the shareholders it was desirable to liquidate or retain their investment in the corporation.

In his dual position as an offeree and as a shareholder Petitioner needed full disclosure of the material facts[2]

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[2] "Material" has been defined by the Securities and Exchange Commission as "matters as to which an average prudent investor ought reasonably to be informed . . . ." Rule 405 under the Securities Act of 1933, 17 C.F.R. sec. 230.405.

from which, as an offeree, he could reasonably evaluate the Invitation and determine whether to sell or to hold, and, as a shareholder, he could determine whether the proposed transaction would accomplish a useful business purpose or would merely be a waste of corporate assets. The insufficiency of the information left Petitioner with no adequate means of appraising his position either as an offeree or as a shareholder. Petitioner then wrote to the corporation for further information and requested postponement of the transaction until such information would be forthcoming. (Exhibit B, hereto, *infra* p. 11a)

Receiving no reply to his protests and requests for information, Petitioner filed suit in the District Court at Chicago in two counts. In Count I he complained, as an offeree, and on behalf of all others similarly situated, of the insufficiency of the disclosure, alleging violation of Rule 10(b)-5 in connection with the proposed purchase and sale of the stock. In Count II he complained, as a shareholder, in a derivative capacity, that the acts complained of constituted a waste of corporate assets and other misconduct of the defendants which would expose the corporation to extensive liability by reason of such misconduct.

Count I[3] attacked the Invitation for Tenders under various of the antifraud provisions of the federal securities acts and regulations thereunder, including Rule 10(b)-

[3] Count I, the only Count involved in this Petition, alleged violation of Section 17(a) of the Securities Act of 1933, as amended, 15 U.S.C. Sec. 77q(a); Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b); Rule 10(b)-5 of the Rules and Regulations of the Securities and Exchange Commission promulgated under Section 10(b) of the Securities Exchange Act of 1934, as amended; Sections 9(a)(4) and 9(e) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. Secs. 78i(a)(4), 78i(e).

5 under the Securities Exchange Act of 1934. Under this Count Petitioner sought to enjoin the corporation and the named defendants ("insiders") from carrying out the proposed purchase "unless and until the defendants shall cause Schenley to transmit to all of its shareholders further and additional information fully disclosing the purported business purposes of such Invitation for Tenders, and all material facts and circumstances concerning the financial condition of Schenley and the value of its common stock, sufficient to enable the common shareholders to reasonably appraise the value of their stock and to determine whether to accept such Invitation for Tenders" (Appendix B hereto, *infra* pp. 13a-14a).

Deficiencies of the Invitation for Tenders.

It was specifically alleged that the Invitation was deceitful in at least the following respects:

1. By furnishing a five-year summary of market prices the "generosity" of the $32 price was emphasized. It seemed patent that the tender price of $32 per share, which was approximately $5 in excess of the recent market price, was designed to induce shareholders to tender their stock and to discourage them from seeking further disclosure.

Although in 1960 the stock reached a high of $37⅜, it was as low at $15⅝ in 1962, and the highest it reached between January 1, 1963 and the date of the "Invitation" was $23⅝, except that it reached $27¼ a day or two prior to the mailing of the "Invitation."

2. The only financial data presented was for the four months ended December 31, 1964 (unaudited) and similar data for the same period in 1963. The data revealed a

slight increase in sales and an increase in earnings per share from 54¢ to 92¢ in the four-month period, exclusive of the corporation's interest in a recently acquired company.

Not revealed, however, and not suggested in any manner, but made public in the Wall Street Journal on March 25, 1965 were the extraordinarily improved figures for the six months ended February 28, 1965; the closing date of this period antedated by almost a week the date (March 4 or 5) on which the corporation completed the Invitation by sending out checks. As compared to the six months ended February 28, 1964 net income increased almost *9 million* dollars from $5,693,679 to $14,584,416 and earnings per share increased from *$1.10* to *$2.90* per share, including 71¢ per share from a previously undisclosed special credit of $3,544,192 attributable to the sale of a brewing company stock.

3. There was no disclosure of the current book value per share although it was apparent that as late as August 31, 1964, the date of the last publicly available financial statements, that the book value per share was approximately $10.00 in excess of the tender price. There was also no disclosure that current assets at August 31, less all liabilities equalled approximately $35.00 per share. Thus the per share value of "net quick assets" alone was greater than the tender price.

4. The statement that the Invitation "is not open to any officer or director of the company or his 'associates' as defined in Rules and Regulations of the Securities and Exchange Commission under The Securities Exchange Act of 1934" clearly suggested that excluding such persons from the Invitation was either a requirement of the Securities and Exchange Commission or was in compliance with some rule of the Commission.

This, of course, was not the fact nor was it ever argued by defendants to be a fact.

There should have been a clear statement that the insiders were the very persons who had caused the corporation not to include them in the tender invitation; their action in not tendering—and in causing the corporation to go through the form of excluding them from the tender—should have been made explicit.

5. There was no disclosure that the book value and per-share earnings of the shares of the non-tendering shareholders would be substantially increased and that the percentage of ownership of outstanding shares by the non-tendering shareholders (including the president of the corporation, his associates, and persons controlled by him) would be increased.

6. There was no disclosure that the chief beneficiary of the transaction would be defendant Lewis S. Rosenstiel, president of the corporation, his associates and persons controlled by him, who together owned directly or indirectly approximately 24% of the outstanding common stock (Appendix B, *infra*, p. 6a).

7. The reference in the Invitation to "approaches" (which "have not been definitive as to price or otherwise") to certain major shareholders to purchase their shares suggested that outsiders had some design on acquiring a position of control or at least an important position in the ownership of Schenley stock. Failure to disclose the circumstances relating to such "approaches" and failure to negate the inference that the principal purpose of the Invitation was to assist the insiders in preserving and improving their control, at no personal cost or expense, lead to the inference, no other purpose being suggested, that such was the only purpose.

Moreover, the phrase "not . . . definitive" is consistent with serious discussions of prices substantially in excess of the tender price.

8. The use of $32,000,000 of company money to retire stock implied that the money was not needed in the business or for business purposes. In fact, however, the August 31 balance sheet, referred to in the Invitation, reflected only $34,000,000 of cash on hand. The most likely probability, of course, is that the company planned to borrow all or most of the $32,000,000 to pay for the stock. The source of funds, however, was not stated in the Invitation.

Under the circumstances, financial statements giving effect *pro forma* to the retirement of $32,000,000 of stock, the borrowing to carry out the transaction, and reflecting the effect of the interest charges on the earnings per share of the remaining stock was indispensable for a prudent determination by a shareholder of whether or not to tender.

The District Court Proceedings.

Petitioner's suit, "individually and on behalf of all other similarly situated shareholders," was filed on February 5, 1965. On February 10, 1965, the District Court heard arguments from counsel on the issues raised by Count I of the Complaint as to violation of Rule 10(b)-5. At the conclusion of argument, the court entered an order prohibiting completion of the tender invitation until a further hearing. (R. 120, 127, 128) No action was taken by the District Court respecting Count II (Appendix B, *infra*, pp. 14a-16a) which sought an adjudication of mismanagement and waste of corporate assets; this Count is still pending.

The District Court's order of February 10, 1965 was embodied in a document captioned "Findings of Fact,

Conclusions of Law, and Order" (R. 120) which found as a fact that the Invitation was false and misleading in violation of Rule 10(b)-5 on the grounds recited in the complaint.[4] Appeal followed.

The Court of Appeals Proceedings.

On February 26, 1965 the Court of Appeals, after emergency hearing, entered its judgment as to which Petitioner now seeks a writ of certiorari (Appendix A, *infra*, p. 1a). That court decided that Petitioner, and other shareholders similarly situated, had no standing to sue under Rule 10(b)-5, citing *Birnbaum* v. *Newport Steel Corp.*, 193 F. 2d 461 (CA-2), *cert. denied* 343 U.S. 956 (1952). It remanded with directions to dismiss Count I (Appendix A hereto, *infra*, p. 2a).

In addition, the court below gratuitously concluded that "[n]either the matters and things alleged in the complaint . . . or disclosed by the record herein, are or tend to show any violation of said Act [the Securities Exchange Act of 1934] or Rule 10(b)-5 . . ." and that "Count I . . . fails to set forth a claim with respect to which the District Court has jurisdiction or upon which a preliminary injunction can be predicated. . . ."

These additional conclusions reflect either a complete disregard for the District Court's findings of fact or a totally unwarranted hypothesis that an invitation for stock tenders attacked as false can be held sufficient without any hearing to determine the relevant facts. In view

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[4] There was considerable controversy over whether the court entered a temporary restraining order or a preliminary injunction, Petitioner arguing that it was only a temporary restraining order not subject to appeal. The Court of Appeals decided it was a preliminary injunction and we accept that view as, of course, we must for purposes of this Petition.

of the summary of the deficiencies of the Invitation, set forth above, pp. 8-11, the Court of Appeals' peremptory ruling on the substantive violation was clearly erroneous. Having undertaken to pass on the merits, the Court of Appeals was necessarily required either to credit the findings of fact of the District Court, unless clearly erroneous; or if for some reason it did not intend to credit such findings, it was incumbent on it to recognize that by giving its approval to the Invitation for Tenders it was making an affirmative determination of factual issues without any hearing, testimony, depositions or other evidence on the merits. Petitioner's verified complaint (Appendix A, *infra*, p. 3a) and supporting affidavit (R. 203) as to which no answer or traverse was ever filed by Respondent comprised the sole record of facts before the Court of Appeals.

Clearly, on the face of the one-page Invitation for Tenders alone, no court could make an affirmative determination that it was not false and misleading. For example, subsequent events made it abundantly clear that vital information as to earnings had been concealed. See page 9, *supra*. Whether the dramatic increase in earnings was known to the insiders at the time the Invitation was extended, or even at the time of acceptance by the corporation of the tenders and payment for the stock, is certainly a matter for discovery.[8] Likewise, e.g., discovery would have revealed perhaps how high the "not . . . definitive" discussions as to price for the purchase of shares

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[8] The mandate issued on March 4, 1965. Checks to the tendering shareholders were issued forthwith. By this time it was at least highly likely that the insiders knew of the spectacular improvement in earnings for the six months ended February 28, 1965, even though the information was not made public until it appeared in the Wall Street Journal on March 26, 1965. See page 9, *supra*.

from the major shareholders had gone, or the real business or other purpose of the tender invitation.

The ruling of the Court of Appeals on substantive violation of Rule 10(b)-5 is thus manifestly erroneous and merits no further discussion. This Petition is, therefore, devoted to the important question of standing to sue which has not been but should be decided by this Court.

REASONS FOR GRANTING THE WRIT.

(1) The Decision Below Is in Conflict With The Purposes of the Federal Securities Laws and the Canons of Construction of These Laws As Set Forth By This Court in Its Borak Decision And in Its Capital Gains Research Decision.

The Court of Appeals for the Seventh Circuit determines in effect that no matter how deceptive, fraudulent or insufficient an invitation for stock tenders may be, a shareholder of the issuing corporation has no standing to sue (for himself and others similarly situated) unless he has been sufficiently deceived to have sold his shares, thereby posturing himself as a "seller."

The question presented is whether shareholders, confronted with insufficient disclosure in an invitation to tender stock to their corporation, are compelled to decide in ignorance of the material facts, or in reliance on patently inadequate representations whether to tender, or whether such shareholders have standing to seek to enjoin the proposed acquisition until full disclosure has been made and a firm basis for an informed judgment has been presented to them.

The decision of the Court of Appeals, precluding action by shareholders who do not tender their stock (and thereby do not posture themselves as "sellers") reflects a narrow construction of the congressional purposes under-

lying the antifraud provisions of the federal securities acts.

These laws were intended by the Congress to assure that the investing public would not be compelled to make investment decisions blindly or on the basis of false and misleading information, but on the basis of full disclosure of the material facts. This is clear, of course, not only from the announced purposes of the legislation but from recent decisions of this Court and many decisions of the lower courts.

Both the Securities Act of 1933 and the Securities Exchange Act of 1934 were part of President Roosevelt's broad reform program. In a message to the Senate on March 29, 1933 he said [S. Rep. No. 47, 73d Cong., 1st Sess. 6-7 (1933)]:

> "There is, however, an obligation upon us to insist that every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information, and that no essentially important element attending the issue shall be concealed from the buying public.

The 1933 Act with its policy of insuring full disclosure of information in connection with new issues of securities was responsive to the President's message. The Act's subtitle is indicative: "An Act to Provide Full and Fair Disclosure of the Character of Securities sold in Interstate and Foreign Commerce and Through the Mails, and to Prevent Frauds in the Sale Thereof, and for other Purposes."

In a message to Congress on February 9, 1934, Mr. Roosevelt expressed approval of the legislation already passed and said [H.R. Rep. No. 1383, 73d Cong., 2d Sess. 1 (1934)]:

"There remains the fact, however, that outside the field of legitimate investment naked speculation has been made far too alluring and far too easy for those who could and for those who could not afford to gamble.

"Such speculation has run the scale from the individual who has risked his pay envelope or his meager savings on a margin transaction involving stocks with whose true value he was wholly unfamiliar, to the pool of individuals or corporations with large resources, often not their own, which sought by manipulation to raise or depress market quotations far out of line with reason, all of this resulting in loss to the average investor, who is of necessity personally uninformed."

Thus, the next step, as the President viewed it, was to protect the uninformed individual investor in transactions of purchase and sale after the original distribution such as *e.g.*, the stock tender transaction here. In response, Congress passed the Securities Exchange Act of 1934 under which Rule 10(b)-5 was adopted.

The remedial philosophy that should prevail in all areas of judicial administration of the federal securities acts was confirmed emphatically in *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964). This Court, in implying a private right of action for enforcement of the Securities and Exchange Commission proxy rules, observed that Section 14(a) of the Exchange Act evidenced "broad remedial purposes," that among the chief purposes of the section is "the protection of investors, which certainly implies the availability of judicial relief where necessary to achieve that result" (p. 432). It was also pointed out that "[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action . . . the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements"

(p. 432). These considerations apply with equal force to Rule 10(b)-5.

Finally, this Court emphasized "the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose" (p. 433).

In *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963), this Court construed section 1 of the Investment Advisers Act of 1940, 15 U.S.C. sec. 80b-1, prohibiting fraudulent practices by investment advisers in terms similar to Section 17(a) of the Securities Act and Rule 10(b)-5 under the Securities Exchange Act. This Court said (p. 186):

> "The Investment Advisers Act of 1940 was the last in a series of acts designed to eliminate certain abuses in the securities industry, abuses which were found to have contributed to the stock market crash of 1929 and the depression of the 1930's. It was preceded by the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, and the Investment Company Act of 1940. A fundamental purpose, common to these statutes, was to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry. As we recently said in a related context, 'It requires but little appreciation . . . of what happened in this country during the 1920's and 1930's to realize how essential it is that the highest ethical standards prevail' in every facet of the securities industry. Silver v. New York Stock Exchange, 373 U.S. 341, 366."

The decision of the court below flies in the face of these definitive pronouncements by this Court, as well as repeated similar expressions by the lower courts and by the Securities and Exchange Commission.

It is plainly contrary to the purposes of the federal securities laws to deprive the shareholder of a fair chance to make an informed decision on the basis of full disclosure. He can of course, as Petitioner did here, refuse to tender on the basis of inadequate disclosure. But this does not give him the relief the statute contemplates. To carry out the purposes of the securities laws he should have the right sought here to compel the offer to be held in abeyance until adequate disclosure is made.

(2) The Decision Below Is Not Only Contrary To The Objectives Of The Federal Securities Laws But It Cannot Be Squared With The Language of Rule 10(b)-5.

The court below, relying on *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (CA-2 1952), *cert. denied* 343 U.S. 956 (1952), held that plaintiff had no standing to sue.

That court did not explain why it felt that *Birnbaum* led to its conclusion. Obviously, however, shareholders who, as offerees receive an invitation to tender shares, comprise a class of investors who are asked to make an investment judgment based on the information provided. The question is simply whether such shareholders, without tendering their shares, have any rights within Rule 10(b)-5.

It is only by narrowly limiting the language of Rule 10(b)-5 to persons who have already sold their shares that non-tendering shareholders may be excluded from the purview of the rule.

The court below refused to give effect to the words *"in connection with"* contained in the Rule 10(b)-5 phrase *"in connection with the purchase or sale of any security."* If an offer by a corporation to purchase its own shares is not an "act, practice, or course of business" *"in connection with the purchase or sale of any security"* it is difficult to conceive of any possible meaning for the words

"in connection with." Patently, then, the language of Rule 10(b)-5 is not limited directly to completed purchases or sales. Equally patently, an offer is an integral part of a purchase and sale.

To hold, as the court below apparently did, that an offer to buy is *not* "in connection with" a purchase of a security will also have serious repercussions when applied to injunctive proceedings or criminal prosecutions brought by the Securities and Exchange Commission, putting the Commission in the position of having to await the consummation of the fraudulent scheme and the imposition of actual loss to investors before seeking to apply the sanctions of the Exchange Act.

In *Cady, Roberts & Co.*, 40 S.E.C. 907, 911 (1961) the Securities and Exchange Commission stated:

> "The language of Rule 10b-5 is broader in several respects than that of Section 17(a) of the Securities Act. Thus, while Section 17(a) prohibits fraudulent or deceptive practices 'in the offer or sale" of any security, Rule 10b-5 prohibits such activities 'in connection with the purchase or sale' of any security."

The decision below is so opposed to the fundamental spirit of the federal securities laws that it is necessary for this Court to accept jurisdiction and reverse so that the lower courts will be clear that the remedial approach of *Borak* and *Capital Gains Research* applies also to the anti-fraud provisions of those laws.

(3) The Decision Below Affects An Area of Securities Transactions of Frequent Occurrence and of Great Financial Importance.

The importance of an offeree's standing to seek an injunction in stock tender situations is underscored by the fact that an ever-increasing number of firms are buy-

ing their own stock in the market or by means of invitations to their shareholders to tender. According to an article in the March, 1965, Harvard Business School Bulletin,* in 1963 alone corporations listed on the New York Stock Exchange spent 1.3 *billion* dollars to repurchase their own securities. This represented a five-fold increase over such purchases ten years earlier. It also represented *more* than the amount of money raised in that year by such corporations from the sale of their own shares.

(4) The Remedy Sought Is Necessary to Carry Out The Purposes of the Federal Securities Laws.

In contrast to the carefully prescribed limitations on the sale of securities encompassed by the Securities Act of 1933, the rapidly growing field of corporate repurchases of securities, however, is regulated only by Rule 10(b)-5 and its prohibition against false and misleading statements. If a shareholder-offeree must first tender his stock before he has standing, individually and on behalf of the other offerees, to enforce a demand for full disclosure, ancillary enforcement of Rule 10(b)-5 by private parties in stock tender situations is virtually nullified.

In such circumstances the staff of the Securities and Exchange Commission will be left with the entire task of preventing and restraining acquisitions by corporations of their own stock by fraudulent means.

In addition to the staff problems involved, the Commission does not process tender invitations, as it does proxy material, and thus will normally not be aware of the inadequacy of disclosure in any tender invitation. Indeed, the Commission will frequently not know that a tender invitation has been made until it has been concluded. Accordingly, official action will be available only on a

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*Fleck, *Corporate Share Repurchasing: an Informed Discussion*, 41 HARV. BUS. SCHOOL BULL. 10 (1965).

haphazard basis and will provide no real protection to the shareholder.

Moreover, if the only available remedy consists of individual actions for damages following completion of a fraudulent tender invitation, insiders may assume such risk with only minimal fear of retribution. In contrast to the impact of a suit to prevent and restrain a transaction, the impact of a handful of scattered subsequent damage claims is insignificant.

The questions presented to the Court are thus of vital public importance and should be resolved. The investing public, corporate insiders and all persons concerned with the administration of corporate finances should know that Rule 10(b)-5 may be invoked by a shareholder to prevent and restrain consummation of an invitation for stock tenders unless and until full and adequate disclosure is made.[7]

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[7] In Fleischer, *Federal Corporation Law: An Assessment*, 78 HARV. L. REV. 1146, 1166-67 (1965), the author formerly Executive Assistant to the Chairman of the Securities and Exchange Commission, wrote: "A variation of the situations described above [generally, sales by corporations of their own shares] can occur when a corporation, usually at the behest of management, buys stock in a tender offer made generally to its stockholders, or redeems the stock of a particular stockholder. *Under these circumstances it is clear that the company is subject to the antifraud* provisions [e.g. Kohler v. Kohler, 319 F. 2d 634 (7th Cir., 1963); see Kennedy, *Transactions by a Corporation in its Own Shares*, 19 BUS. LAW. 319 (1964)]. *It has a responsibility to make adequate disclosure of any facts that would affect the investment judgment of the selling shareholders*" (italics added).

One of the extraordinary features of the instant case is the failure of the Court of Appeals to heed its own views as previously expressed in *Kohler*.

(5) There Is Substantial Conflict In Principle Between The Decision Below and Decisions Of The Third and Fifth Circuits as Well as The Cited Rulings of This Court.

The decision of the Seventh Circuit below is believed to be erroneous in its narrow construction of Rule 10(b)-5. The decisions of the Third Circuit in *McClure* v. *Borne Chemical Co.*, 292 F.2d 824 (1961), *cert. denied* 368 U.S. 939 (1961), and of the Fifth Circuit in *Hooper* v. *Mountain Securities Corporation*, 282 F.2d 195 (1960), *cert. denied*, 365 U.S. 814 (1961), conflicting in principle, are believed to be correct and in accord with the rulings of this Court in *Borak* and *Capital Gains Research*.

Hooper permitted a trustee in bankruptcy to sue under Rule 10(b)-5 for damages resulting from an allegedly fraudulent scheme by which the corporation had been induced to issue stock in exchange for worthless assets. The court's determination that the trustee in bankruptcy had standing to sue was founded on a broadly reasoned construction of the purposes of Rule 10(b)-5 and was made over the objection that only an "investor" has standing to sue under Rule 10(b)-5.

In *McClure*, the Third Circuit adopted a broad view of Rule 10(b)-5 and held, in the words of Chief Judge Biggs, that The Securities Exchange Act of 1934:

> ". . . creates many managerial duties and liabilities unknown to the common law. It expresses federal interest in management-stockholder relationships which theretofore had been almost exclusively the concern of the states. Section 10(b) imposes broad fiduciary duties on management vis-a-vis the corporation and its individual stockholders. As implemented by Rule 10(b)(5) and Section 29(b), Section 10(b) provides stockholders with a potent weapon for enforcement of many fiduciary duties. It can be fairly said that

> the Exchange Act, of which Sections 10(b) and 29(b) are parts, constitutes far reaching federal substantive corporation law." (292 F.2d at 834)

Indeed the Second Circuit whose *Birnbaum* decision was relied on by the court below has also adopted the broader view of Rule 10(b)-5. In *Ruckle* v. *Roto American Corp.*, 339 F.2d 24 (CA-2, 1964), that Circuit cited both *Hooper* and *McClure* with approval and denied that the older *Birnbaum* case contained any contrary implication.

This Court has adopted the same approach in the construction of other protective provisions of the Federal Securities acts. *J. I. Case Co.* v. *Borak*, 337 U.S. 427 (1964); *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.* 375 U.S. 180, 186, 194-195 (1963). See also *Cady, Roberts & Co.*, 40 S.E.C. (1961). The court below, however, in narrowly confining, if not virtually eliminating, the Rule 10(b)-5 remedy in stock tender situations, seems clearly out of step.

Certainly Rule 10(b)-5 has been recently the subject of more litigation and legal commentary than any other provision of the federal securities laws.[8] We believe, therefore, that it is necessary for this Court to announce that the rule of the *Borak and Captial Gains Research* cases

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[8] See *e.g.*, footnote 7, *supra* p. 20; Posner, *Developments in Federal Securities Regulation*, 20 Bus. Law, 595, 604, 612 (1965); Kennedy, *Transactions by a Corporation in its own Stock*, 19 Bus. Law. 319 (1964); Cary, Israels & Loss, *Recent Developments in Securities Regulation*, 63 Col. L. Rev. 856, 861 (1963); Ruder, *Civil Liability under Rule 10b-5. Judicial Revision of Legislative Intent?* 57 Nw. U. L. Rev. 627 (1963); Comment, *Civil Liability under Section 10B and Rule 10b-5: A Suggestion for Replacing the Doctrine of Privity*, 74 Yale L. Rev. 658 (1965); Comment, *Recent Judicial Extensions of SEC Rule 10b-5*, 63 Col. L. Rev. 934 (1963); Comment, *Insider Liability under Securities Exchange Act Rule 10b-5; The Cady, Roberts Doctrine*, 30 Chi. L. Rev. 121 (1962).

applies equally to the important field of Rule 10(b)-5 and stock tenders.

Summary.

It is clear that the federal securities acts and rules of the Securities and Exchange Commission thereunder were designed to serve broad remedial ends. Despite recent definitive pronouncements of this Court in closely related areas under the securities laws, the decision of the lower court in this case creates doubt and confusion by severely limiting the civil remedies available to carry out the broad purposes of one of the most important provisions of those laws.

In view of the rapidly increasing use by corporations of stock tender invitations it is clear that the applicability of remedies under Rule 10(b)-5 to such transactions has become a matter of major public importance.

The granting of certiorari to settle the standing of shareholder-offerees to challenge an insufficient invitation for stock tenders is necessary to prevent the ruling below from undermining the effect of this Court's decisions in *Borak* and in *Capital Grains Research*.

In addition, of course, the manifestly erroneous ruling that statements challenged as false and misleading and so found by a lower court may be held to be truthful without the taking or weighing of any evidence, particularly where, as in this case, strong evidence to the contrary appeared, is in any event such a clear departure from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision.

Finally, it should be apparent that even though Schenley has now completed the purchase of $32,000,000 of its

stock pursuant to its Invitation for Tenders the fundamental issues decided by the Court of Appeals are not moot. If this Court grants certiorari and reverses the Court of Appeals the case may then be remanded to the District Court with directions to require the respondents to provide adequate disclosure of all facts that would reasonably affect the investment judgment of the shareholders, to permit rescission by any shareholder who so elects, and to tailor such other relief as, after a hearing, might appear proper. That such procedure is appropriate even though the challenged transaction has been completed seems clear from this Court's conclusion in *Borak* that "[w]hatever remedy is necessary must await the trial on the merits." (377 U.S. at 435) See also the broad post purchase relief requested under Rule 10(b)-5 by the Commission's recent action in *Securities and Exchange Commission* v. *Texas Gulf Sulphur Company*, CCH Fed. Sec. L. Rep. ¶91,520 (1965).

CONCLUSION.

For the foregoing reasons this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois
February 26, 1965
Before

Hon. JOHN S. HASTINGS, Chief Judge
Hon. WIN G. KNOCH, Circuit Judge
Hon. LATHAM CASTLE, Circuit Judge

STANLEY JACHIMIEC, Individually and on behalf of all other similarly situated shareholders,
Plaintiff-Appellee,
No. 15027 vs.
SCHENLEY INDUSTRIES, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This appeal having come on for consideration on the briefs and arguments filed herein by the respective parties and upon the oral arguments of counsel made before the Court on February 25, 1965; and upon the emergency motion of plaintiff-appellee to clarify the record on appeal, or, in the alternative, to grant leave to the trial court to clarify its order herein, and the response of defendant-appellant, Schenley Industries, Inc., thereto, which motion was taken with the case on the merits:

And it appearing to the Court that:

(1) The order appealed from is a preliminary injunction;

(2) Plaintiff-appellee, Stanley Jachimiec, prosecutes this action as a class suit on behalf of himself and all other shareholders of the defendant-appellant, similarly situated;

(3) Plaintiff-appellee and other shareholders similarly situated have no standing to maintain such suit under Section 10(b) of the Securities Exchange Act or Rule (10(b)-5 promulgated thereunder (Birnbaum v. Newport Steel Corp., 2 Cir., 193 F. 2d 461);

(4) Neither the matters and things alleged in the complaint of the plaintiff-appellee, or disclosed by the record herein, are or tend to show any violation of said Act or Rule 10(b)-5; and

(5) Count 1 of said complaint fails to set forth a claim with respect to which the District Court has jurisdiction or upon which a preliminary injunction may be predicated;

IT IS THEREFORE ORDERED that the motion of plaintiff-appellee to clarify the record on appeal, or, in the alternative, to grant leave to the trial court to clarify its order, is denied;

AND, IT IS FURTHER ORDERED that the order appealed from is reversed, the preliminary injunction granted by the District Court is vacated and dissolved, and the cause is remanded to the District Court with directions to dismiss Count I of plaintiff's complaint.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STANLEY JACHIMIEC, individually and on behalf of all other similarly situated shareholders of SCHENLEY INDUSTRIES, INC.,

Plaintiff

vs.

SCHENLEY INDUSTRIES, INC., a corporation, W. E. BLAKELEY, E. R. DEUTSCHE, THEODORE GOMMI, MILO B. HOPKINS, P. E. LOCKWOOD, JOHN MACKIE, E. S. MONOHAN, J. LINCOLN MORRIS, MILTON J. NAUHEIM, L. B. NICHOLS, LEWIS S. ROSENTIEL, A. D. SCHULTE, R. G. SMITH and THEODORE C. WIEHE,

Defendants.

Civil Action
No. 65 C 186

COMPLAINT

COUNT I

Plaintiff, STANLEY JACHIMIEC, by his attorneys, complains of defendants, on his own behalf and on behalf of all other similarly situated shareholders of SCHENLEY INDUSTRIES, INC., a corporation, and states:

The Parties and Co-Conspirators

(1) Plaintiff, STANLEY JACHIMIEC, is a citizen and resident of the State of Illinois, and at all times since the year 1954 has been the beneficial owner of shares of the capital stock of defendant SCHENLEY INDUSTRIES, INC. (herein called "SCHENLEY"). On the date hereof

plaintiff owns more than 500 shares of the issued and outstanding common stock and more than 75 shares of the issued and outstanding preferred stock of SCHENLEY.

(2) SCHENLEY is a corporation organized under the laws of the State of Delaware, having its principal office in New York, New York. SCHENLEY, directly and through subsidiaries, is engaged, in substance, in the business of producing, bottling, distributing and selling whiskies, wines, spirits and pharmaceuticals throughout the United States and many foreign countries. The outstanding common stock of SCHENLEY, par value $1.40 per share ("the common stock") and the outstanding preferred stock of SCHENLEY are each listed and traded on the New York Stock Exchange. As of November 5, 1964 SCHENLEY had issued and outstanding approximately 6,000,000 shares of common stock, which stock is held by thousands of members of the investing public. By reason of the public distribution of SCHENLEY stock and the listing and marketing of such stock on a national securities exchange, SCHENLEY is subject to provisions of the Securities Act of 1933, as amended (15 U.S.C. §77a et seq.), the Securities Exchange Act of 1934 (15 U.S.C. §78a et seq.) and the Rules and Regulations of the Securities and Exchange Commission promulgated under such Acts.

(4) W. E. BLAKELEY, E. R. DEUTSCHE, THEODORE GOMMI, MILO B. HOPKINS, P. E. LOCKWOOD, LACK MACKIE, E. S. MONOHAN, J. LINCOLN MORRIS, MILTON J. NAUHEIM, L. B. NICHOLS, LEWIS S. ROSENTIEL, A. D. SCHULTE, R. G. SMITH and THEODORE C. WIEHE comprise the board of directors of SCHENLEY. Certain of these persons are officers of SCHENLEY. Plaintiff is informed and believes, and states upon such information and belief, that all of these persons are citizens and residents of states other than Illinois. Such persons are sometimes herein collectively referred to as

"the individual defendants". The individual defendants, in their capacity as directors of SCHENLEY and in their individual capacities, have authorized and participated in the acts of SCHENLEY hereinafter complained of.

(4) Plaintiff is informed and believes, and states upon such information and belief, that other persons, firms and corporations the names of which are presently unknown to plaintiff, have acted in concert with SCHENLEY and with the individual defendants in carrying forward the acts of SCHENLEY hereinafter complained of. Such persons are hereby designated as co-conspirators.

Jurisdiction and Venue

(5) Jurisdiction of this Count is predicated upon (i) the provisions of Section 1331 of the Judicial Code of the United States (28 U.S.C. §1331), (ii) the provisions of Section 22(a) of the Securities Act of 1933, as amended (15 U.S.C. §77va), and (iii) the provisions of Section 27 of the Securities Exchange Act of 1934, as amended (15 U.S.C. §78aa) by reason of the existence of a controversy arising under the laws of the United States relating to regulation of securities.

(6) Venue is laid in this judicial district under the provisions of Section 27 of the Securities Exchange Act of 1934, as amended (15 U.S.C. §78aa) and the provisions of Section 22(a) of the Securities Act of 1933, as amended (15 U.S.C. §77va) The acts and transactions constituting the unlawful acts hereinafter complained of are being carried out in this judicial district in that Lehman Brothers, a member firm of the New York Stock Exchange with a branch office at 39 South LaSalle Street, Chicago, Illinois, is acting as agent of SCHENLEY in soliciting tenders of shares of SCHENLEY common stock

throughout the City of Chicago and environs, all upon the terms and conditions hereinafter set forth.

Acts Complained Of

(7) Sometime prior to January 28, 1965, the exact date being unknown to plaintiff, SCHENLEY, the individual defendants and the co-conspirators, entered into a scheme, device or artifice to defraud the shareholders of SCHENLEY, the essential terms of which scheme, device or artifice were that the defendants and co-conspirators, for their own purposes and without benefit to SCHENLEY or to the shareholders of SCHENLEY, would utilize many millons of dollars of SCHENLEY's funds to cause SCHENLEY to acquire from owners of SCHENLEY common stock approximately 15% of SCHENLEY's outstanding common stock, thereby securing and enhancing the control of SCHENLEY by the individual defendants and the co-conspirators, increasing the value of the SCHENLEY common stock held by them, and securing and preserving their emoluments of office, all without individual cost or expense to them.

(8) LEWIS S. ROSENTIEL is President of SCHENLEY and is Chairman of its Board of Directors. Such defendant, his associates, and persons controlled by him, own directly and indirectly approximately 1,450,000 shares of SCHENLEY common stock, comprising approximately 24% of such outstanding common stock; plaintiff is informed and believes, and states upon such information and belief that LEWIS S. ROSENTIEL is the prime mover and the chief beneficiary in the aforesaid scheme, device or artifice to defraud the shareholders of SCHENLEY.

(9) On or about January 28, 1965, the individual defendants and the co-conspirators caused SCHENLEY to transmit via the United States mails to all of the record holders of SCHENLEY common stock a printed document

captioned "Invitation for Tenders". Such Invitation for Tenders, a copy of which is annexed hereto and hereby made a part of this Complaint as Exhibit A hereof, comprises an offer by SCHENLEY to purchase from shareholders 1,000,000 shares of SCHENLEY common stock at a price of $32.00 per share, or an aggregate of $32,000.00. The offer, by its terms will remain open until 3:00 p.m., Eastern Standard Time on February 11, 1965.

(10) The aforesaid offered price of $32.00 per share is $4.75 per share in excess of the closing price of SCHENLEY common stock on the New York Stock Exchange on January 26, 1965, as set forth in such Invitation for Tenders. Such excess price of $4.75 per share constitutes a premium designed to induce and entice the holders of SCHENLEY common stock to tender their stock at such price, and in the event of an aggregate tender of 1,000,000 shares will constitute a premium of $4,750,000 to be paid by SCHENLEY in excess of the aforesaid market price of its common stock.

(11) The most recent publicly available balance sheet of SCHENLEY, as at August 31, 1964, reflects a book value per share of SCHENLEY common stock in excess of $44.00 per share. Plaintiff is informed and believes, and states upon such information and belief, that the current book value per share of SCHENLEY common stock is much in excess of $32.00 per share.

(12) The aforesaid Invitation for Tenders, is a manipulative, deceptive, misleading and fraudulent scheme, device and artifice in violation of applicable statutes of the United States and of Rules and Regulations of the Securities and Exchange Commission promulgated pursuant thereto, as hereinafter more specifically described, in that:

(A) The Invitation for Tender fails to disclose such necessary and material facts and circumstances concerning the financial condition of SCHENLEY and the value of its common stock as are reasonably required for a shareholder to make a prudent judgment as to whether to tender his stock;

(B) The necessary material facts and circumstances concerning the financial condition of SCHENLEY and the value of its common stock have been wilfully concealed by SCHENLEY, the individual defendants and the co-conspirators so that the SCHENLEY common shareholders will be induced and enticed to sell their common stock to SCHENLEY at the invited price;

(C) The Invitation for Tenders fails to disclose and fails to suggest any business purpose whatever for the proposed undertaking by SCHENLEY to spend $32,000,000.00 to acquire shares of its outstanding common stock; the funds of SCHENLEY are a trust fund to be administered by the directors for the use and benefit of SCHENLEY and of its stockholders, and for no other purposes, and may be properly employed only to carry out reasonable and lawful business purposes of SCHENLEY;

(D) The Invitation for Tenders willfully conceals from the shareholders all information respecting the current book value per share of the SCHENLEY common stock;

(E) The Invitation for Tenders fails to disclose or to suggest a business purpose for offering a premium price of approximately $4.75 per share in excess of the current market price of the SCHENLEY common stock; plaintiff is informed and believes, and states upon such information and belief that there is no

business purpose for the offer by SCHENLEY of such premium price, and that such premium price has been offered for the sole purpose of inducing and enticing the shareholders to quickly tender their shares in accordance with the Invitation for Tenders and to discourage the shareholders from seeking knowledge of the material facts and circumstances underlying such Invitation for Tenders.

(F) The Invitation for Tenders states that "[t]he company has been advised by certain major stockholders that approaches have been made to them indicating an interest in the purchase of their shares. Such approaches have not been definitive as to price, or otherwise. The Company has no knowledge as to whether such approaches will be renewed or whether offers to other stockholders, by way of invitations for tenders or otherwise, may be forthcoming." Plaintiff is informed and believes, and states upon such information and belief, that full and complete disclosure of the facts and circumstances relating to such "approaches" will demonstrate that the Invitation for Tenders is designed and calculated (i) to enhance and preserve the control of SCHENLEY by the individual defendants and co-conspirators, (ii) to increase the value of their retained stock at the expense of the corporation and of the selling shareholders; and (iii) serves no *bona fide* business purpose whatever.

(G) In the event that 1,000,000 shares are tendered in pursuance of the Invitation for Tenders the book value of the approximately 1,450,000 shares owned directly and indirectly by defendant LEWIS S. ROSENTIEL, his associates and persons controlled by him will be increased approximately $2.50 per share,

or an aggregate increase of approximately $3,625,000, with no cost or expense whatever to such persons.

(13) By reason of the matters and things hereinabove set forth, the aforesaid Invitation for Tenders (i) constitutes employment of a scheme, device or artifice to defraud the SCHENLEY common shareholders, (ii) constitutes a scheme, device or artifice to obtain 1,000,000 shares of the outstanding common stock of SCHENLEY by means of omission to state material facts necessary in order to make statements contained in such Invitation for Tenders, in the light of the circumstances in which they were made, not misleading, (iii) constitutes the engaging in a transaction, practice or course of business which operates as a fraud or deceit upon owners of the common stock of SCHENLEY [all in violation of Section 17(a) of the Securities Act of 1933, as amended (15 U.S.C. §77qa) and Rule 10(b)(5) of the Rules and Regulations of the Securities and Exchange Commission under Section 10(b) of the Securities Exchange Act of 1934, as amended], (iv) constitutes the making of statements which at the time and in the light of the circumstances under which they were made, were false or misleading with respect to material facts and which makers "knew or had reasonable ground to believe . . . [were] false or misleading" [in violation of Sections 9(a)(4) and 9(e) of the Securities Exchange Act of 1934, as amended (15 U.S.C. §78ia4, §78ie)], and (v) the acceptance by SCHENLEY from any holder of its outstanding common stock, in pursuance of the aforesaid Invitation for Tenders, constitutes a contract to purchase stock by SCHENLEY, which contract by reason of the provisions of Section 29(b) of the Securities Exchange Act of 1934, as amended (15 U.S.C. §78ccb) will be null and void as regards the right of any such shareholder.

(14) Plaintiff, by his counsel, by letter and telegram of February 2, 1965, addressed to SCHENLEY and to LEHMAN BROTHERS, its dealer-manager in soliciting tenders, has requested that SCHENLEY defer and postpone the Invitation for Tenders unless and until full and complete disclosure, in compliance with applicable statutes and administrative regulations, has been made to the owners of SCHENLEY's outstanding common stock. No reply has been received and by reason of the matters and things aforesaid, further requests will be futile.

(15) This action is not a collusive action to confer jurisdiction on this Court.

(16) There is no adequate remedy at law for SCHENLEY, the plaintiff and all other common shareholders of SCHENLEY.

(17) Unless restrained and enjoined by order of this Court, the defendants and co-conspirators will carry out and complete the purchase of shares of SCHENLEY common stock in pursuance of the aforesaid Invitation for Tenders, thereby causing irreparable loss and damage to SCHENLEY, to plaintiff and to all other common shareholders of SCHENLEY, in that:

(A) SCHENLEY will be required to and will pay out from its corporate treasury, without any business purpose whatever, an amount up to $32,000,000 for the purchase of shares of its common stock, of which sum an amount up to $4,750,000 will constitute a premium over and above the current price per share of its outstanding common stock;

(B) Numerous shareholders of SCHENLEY will be unlawfully induced and enticed to sell shares of their common stock to SCHENLEY at less than the book value thereof, and without knowledge of the ma-

terial facts and circumstances reasonably required by them to make a judgment as to the value of their stock;

(C) The value of the stock of the remaining shareholders, including the individual defendants, and including particularly defendant LEWIS S. ROSENTIEL, will be increased and enhanced, without cost or expense to them;

(D) The control of the management of SCHENLEY by the individual defendants, and in particular by defendant LEWIS S. ROSENTIEL, his associates and controlled persons, will be secured and enhanced without cost or expense to them;

(E) A contingent liability of SCHENLEY and of the individual defendants and co-conspirators to all of the selling shareholders in a maximum aggregate amount of $32,000,000 will be created since each and every shareholder who may tender his stock in pursuance of the Invitation for Tenders will have an action for rescision of the transaction by reason of the unlawful acts of the individual defendants and the co-conspirators in carrying out the aforesaid acquisition by Schenley of shares of its common stock.

WHEREFORE, plaintiff prays that this Court:

1. Order, adjudge and decree that the aforesaid course of conduct by SCHENLEY, the individual defendants and the co-conspirators, (i) constitutes employment of a scheme, device or artifice to defraud the SCHENLEY common shareholders, (ii) constitutes a scheme, device or artifice to obtain 1,000,000 shares of the outstanding common stock of SCHENLEY by means of omission to state material facts necessary in order to make statements contained in such Invitation for Tenders, in the light of the circumstances

in which they were made, not misleading, (iii) constitutes the engaging in a transaction, practice or course of business which operates as a fraud or deceit upon owners of the common stock of SCHENLEY [all in violation of Section 17(a) of the Securities Act of 1933, as amended (15 U.S.C. §77qa) and Rule 10(b)(5) of the Rules and Regulations of the Securities and Exchange Commission under Section 10(b) of the Securities Exchange Act of 1934, as amended], (iv) constitutes the making of statements which at the time and in the light of the circumstances under which they were made, were false or misleading with respect to material facts and which the makers "knew or had reasonable ground to believe . . . [were] false or misleading" [in violation of Sections 9(a)(4) and 9(e) of the Securities Exchange Act of 1934, as amended (15 U.S.C. §78i(a)(4), §78ie)], and (v) the acceptance by SCHENLEY from any holder of its outstanding common stock, in pursuance of the aforesaid Invitation for Tenders, constitutes a contract to purchase stock by SCHENLEY, which contract by reason of the provisions of Section 29 (b) of the Securities Exchange Act of 1934, as amended (15 U.S.C. §78ccb) will be null and void as regards the right of any such shareholder.

2. That this Court temporarily and permanently enjoin SCHENLEY, its officers, agents and employees from causing SCHENLEY to purchase any shares of its outstanding common stock from any of its shareholders in pursuance of the aforesaid Invitation for Tenders, unless and until the defendants shall cause SCHENLEY to transmit to all of its shareholders further and additional information fully disclosing the purported business purposes of such Invitation for Tenders, and all material facts and circumstances concerning the financial condition of SCHENLEY and the value of its common stock, sufficient to enable the common shareholders to reasonably appraise the value of

their stock and to determine whether to accept such Invitation for Tenders.

3. That this Court award to plaintiff his costs and reasonable expenses in preparing and prosecuting this action, and allow to his attorneys reasonable attorneys' fees for their services rendered in the premises.

4. That this Court provide for such other and further relief as it may deem necessary and proper.

COUNT II

The Parties and Co-Conspirators

(1)-(4) Plaintiff incorporates paragraphs (1) through (4) inclusive of Count I as paragraphs (1) through (4) inclusive of Count II hereof.

Jurisdiction and Venue

(5) Jurisdiction of this Court is predicated upon the provisions of Section 1332 of the Judicial Code of the United States (28 U.S.C. §1332) by reason of diversity of citizenship of the parties. The amount in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs. Defendant SCHENLEY is present and doing business in this judicial district by reason of its appointment of LEHMAN BROTHERS, a member firm of the New York Stock Exchange with a branch office at 39 South LaSalle Street, Chicago, Illinois, as its agent in soliciting tenders of the shares of common stock of SCHENLEY throughout the City of Chicago and environs, all upon the terms and conditions hereinafter stated.

(6) Venue as to this Court is laid in this judicial district under the provisions of Section 1391(a) of the Judicial Code of the United States [28 U.S.C. §1391(a)] in that plaintiff resides in this judicial district.

Acts Complained Of

(7)-(11) Plaintiff incorporates paragraphs (7) through (11) inclusive of Count I as paragraphs (7) through (11) inclusive of Count II hereof.

(12)-(15) Plaintiff incorporates paragraphs (14) through (17) inclusive of Count I as paragraphs (12) through (15) inclusive of Count II hereof.

(16) By reason of the matters and things hereinabove set forth, the aforesaid Invitation for Tenders (i) constitutes mismanagement and waste of SCHENLEY's assets, (ii) constitutes a breach of fiduciary duty by the individual defendants, (iii) comprises a fraud and deceit upon the owners of the common stock of SCHENLEY, and (iv) constitutes an illegal scheme to preserve and enhance control of SCHENLEY by LEWIS S. ROSENTIEL, his associates, and persons controlled by him, in violation of the General Corporation Law of The State of Delaware and of the common law of Delaware.

WHEREFORE, plaintiff prays that this Court order, adjudge and decree:

1. That the aforesaid course of conduct by SCHENLEY, the individual defendants and the co-conspirators, (i) constitutes mismanagement and waste of Schenley's assets, (ii) constitutes a breach of fiduciary duty by the individual defendants, (iii) comprises a fraud and deceit upon the owners of the common stock of Schenley, and (iv) constitutes an illegal scheme to preserve and enhance the control of SCHENLEY by LEWIS S. ROSENTIEL, his associates, and persons controlled by him, in violation of the General Corporation Law of the State of Delaware and of the common law of Delaware.

2. That SCHENLEY, its offiecrs, agents and employees, and the individual defendants, their agents and employees, be temporarily and permanently restrained and enjoined until the further order of this Court for causing SCHENLEY to purchase any shares of its common stock from any of its shareholders in pursuance of the aforesaid Invitation for Tenders or of any like invitation.

3. That this Court awarded to plaintiff his costs and reasonable expenses in preparing and prosecuting this action, and allow to his attorneys reasonable attorneys' fees for their services rendered in the premises.

4. That this Court provide for such other and further relief as it may deem necessary and proper.

/s/ Howard R. Koven
Howard R. Koven

/s/ Sheldon O. Collen
Sheldon O. Collen

/s/ Stanley R. Zax
Stanely R. Zax
Attorneys for Plaintiff

Friedman, Koven, Salzman,
Koenigsberg, Specks & Homer

208 South LaSalle Street
Chicago, Illinois 60604
FInancial 6-8500
Of Counsel

STATE OF ILLINOIS }
COUNTY OF COOK } SS

STANLEY JACHIMIEC, being sworn, deposes and states that he is the plaintiff in the above and foregoing action; that he has read the Complaint on his behalf prepared, and that the facts alleged therein are true except that as to the facts alleged on information and belief he is informed and believes that the same are true.

/s/ Stanley Jachimiec
Stanley Jachimiec

Signed and Sworn to before me
this 5th day of February, 1965
/s/ Sylvia Levitt
Notary Public

[SEAL]

Schenley Industries, Inc.

ROCKEFELLER CENTER · 1290 AVENUE OF THE AMERICAS · NEW YORK 19, N · Y · TELEPHONE 957-2200

INVITATION FOR TENDERS

To the Holders of
SCHENLEY INDUSTRIES, INC. Common Stock:

The Board of Directors has determined that it would be in the interest of this Company to acquire a substantial amount of its own Common Stock. Accordingly, the Company hereby invites the holders of its Common Stock, upon the terms and conditions set forth in this Invitation, in the enclosed Transmittal Letter, and on the reverse side thereof, to tender 1,000,000 shares of its Common Stock to the Company at the price of $32 per share. The Company will purchase all shares tendered up to 1,000,000 shares and reserves the right to make a pro rata allocation in the event that more than 1,000,000 shares are tendered.

To take advantage of the Invitation, fill out the enclosed Transmittal Letter and deliver or send it, together with your stock certificates, to the Tender Agent, Manufacturers Hanover Trust Company, Corporate Trust Department, 4th Floor, 40 Wall Street, New York, New York 10015. Shares must be received at the office of said Tender Agent by 3:00 P.M., Eastern Standard Time, on February 11, 1965. Payment for the shares to be purchased pursuant to this Invitation will be made promptly thereafter.

The price range of the Common Stock of the Company on the New York Stock Exchange during the past five years and for 1965 through January 26, the day before the Company announced this Invitation for Tenders, has been reported in published sources as follows:

Year	High	Low
1960	37⅜	19⅞
1961	34⅞	21¼
1962	27½	15⅝
1963	23⅝	18½
1964	24	19
1965 through January 26th	27¼	22¼

The last sale on the New York Stock Exchange on January 26 was 27¼ per share.

The Company's financial statements for its fiscal year ended August 31, 1964 are contained in its Annual Report for that period previously mailed to shareholders. Additional copies of this Annual Report will be sent upon request. Unaudited results of operations of the Company for the four months ended December 31, 1964 show consolidated sales of $184,387,000 and earnings of $1.11 per share. Exclusive of the Company's interest in the sales and earnings of the Buckingham Corporation (which interest was acquired on August 31, 1964) consolidated sales of the Company for said four months period ended December 31, 1964 were $166,824,000 and earnings were $.92 per share. On a comparable basis for the similar period in 1963 consolidated sales were $159,408,000 and earnings were $.54 per share.

This Invitation is not open to any officer or director of the Company or his "associates" as defined in Rules and Regulations of the Securities and Exchange Commission under the Securities Exchange Act of 1934. All common stockholders of record on January 20, 1965 will receive the dividend of 25¢ per share declared December 10, 1964 and payable February 10, 1965 whether or not they tender shares pursuant to this Invitation.

The Company has been advised by certain major stockholders that approaches have been made to them indicating an interest in the purchase of their shares. Such approaches have not been definitive as to price, or otherwise. The Company has no knowledge as to whether such approaches will be renewed or whether offers to other stockholders, by way of invitations for tenders or otherwise, may be forthcoming.

Lehman Brothers is acting as Dealer-Manager in soliciting tenders. The Company will pay to any member of the National Association of Securities Dealers, Inc., whose name appears on the Transmittal Letter as soliciting dealer or broker, a fee of 50¢ per share for each share covered thereby.

Dated: January 28, 1965

By Order of the Board of Directors,

Hugh J. Casey
Secretary

EXHIBIT A TO COMPLAINT

APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois
March 4, 1965

Before

Hon. JOHN S. HASTINGS, Chief Judge
Hon. WIN G. KNOCH, Circuit Judge
Hon. LATHAM CASTLE, Circuit Judge

No. 15027

STANLEY JACHIMIEC, Individually and on behalf of all other similarly situated shareholders of SCHENLEY INDUSTRIES, INC.,
Plaintiff-Appellee

vs.

SCHENLEY INDUSTRIES, INC.,
Defendant-Appellant

Appeal from the United States District Court for the Northern District of Illinois Eastern Division

On consideration of the motion of Schenley Industries, Inc., defendant-appellant, for immediate issuance of the mandate herein and the objections thereto of Stanley Jachimiec, plaintiff-appellee;

And, upon consideration of the emergency motion of plaintiff-appellee, for leave to file an amended complaint herein (said amended complaint being tendered with said motion) and the emergency petition of plaintiff-appellee for rehearing, and the responses of the defendant-appellant to said emergency motion and emergency petition:

IT IS ORDERED that the plaintiff-appellee's emergency motion for leave to file the tendered amended complaint is denied.

IT IS FURTHER ORDERED that plaintiff-appellee's petition for rehearing is denied.

IT IS FURTHER ORDERED that the mandate herein issue forthwith.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1209

STANLEY JACHIMIEC, individually and on behalf of all other similarly situated shareholders of SCHENLEY INDUSTRIES, INC., *Petitioner,*

v.

SCHENLEY INDUSTRIES, INC., a corporation, et al., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT SCHENLEY INDUSTRIES, INC. IN OPPOSITION

THE QUESTION PRESENTED

Does a shareholder of a corporation who did not tender his stock and who is neither a purchaser nor a seller, have standing to enjoin the corporation from consummating the purchase of its shares from tendering shareholders on his claim that the corporation's Invitation for Tenders violated Rule 10(b)-5?

STATEMENT

This, in its present posture, is a suit by a person who has not been injured or threatened with injury, on behalf of a class of which he is not a member, to enjoin a transaction already consummated, on the ground that Schenley has paid too high a price for its shares to stockholders who thereby received too low a price for the very same shares in the very same transaction.

On January 28, 1965, Schenley mailed to its shareholders an Invitation for Tenders (herein "the Invitation") offering to purchase 1,000,000 shares of its outstanding common stock at $32 per share and stating that such a purchase had been determined by the Board of Directors to be in the best interests of the corporation. Shares were to be tendered on or before February 11, 1965, and provision was made for pro rata acceptance if more than 1,000,000 shares were tendered. The Invitation accurately set forth the range of market prices (from a high of 37⅜ in 1960 to a low of 15⅝ in 1962) for 5 years plus 26 days, and also the last sale price (27¼) immediately before the Invitation. It referred to the financial statements for the fiscal year ended August 31, 1964, contained in its Annual Report previously mailed to shareholders and offered to supply additional copies on request. It went on to provide summary sales and earnings data for the subsequent 4 months ended December 31, 1964, the latest month-end prior to the date of the Invitation, and to show precisely how these earnings compared with those for the same 4 months of the prior year.

The Invitation also stated that the offer to purchase was not open to any officer or director or his "associates" as that term is defined in rules of the Securities and Exchange Commission. It further stated that approaches had been made to certain major stockholders indicating an interest in the purchase of their shares, but that such approaches had not been definitive as to price or otherwise and the

corporation had no knowledge as to whether they would be renewed or whether offers might be forthcoming to other shareholders.

Count I of the complaint was based essentially on Section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)-5 thereunder. Count II incorporated all of the substantive allegations of Count I and, on the basis thereof, alleged mismanagement, breach of fiduciary duty and other matters of concern under the Delaware corporation law.

The District Court granted a preliminary injunction without hearing any evidence. An interlocutory appeal was taken immediately.

The Court of Appeals, on the interlocutory appeal, dissolved the injunction and remanded the case with instructions to dismiss Count I of the two count complaint. The action of the Court of Appeals did not affect Count II, which is still pending.

The Court of Appeals ordered Count I dismissed in conformity with a decision of the Court of Appeals for the Second Circuit, *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2nd Cir. 1952), cert. denied 343 U.S. 956 (1952), and because the matters and things alleged in the Complaint or disclosed by the record are not violative of or tend to show any violation of Rule 10(b)-5.[1]

The judgment of the Court of Appeals can be reversed only if neither ground can be supported.

Plaintiff's several improper attempts to supplement the record in his Petition do not call for response here except to point out one significant misstatement of fact.

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[1] As the Court of Appeals found, the Invitation for Tenders was not deceptive, fraudulent or insufficient. The common stock of Schenley is listed on the New York Stock Exchange. The company is consequently subject to the continuous disclosure system of Sections 13 and 14 of the Securities Exchange Act of 1934 and, as

The plaintiff on page 9 of his Petition for Certiorari goes outside the record to refer to a newspaper report of March 25, 1965 of Schenley's net income and earnings for the six months ended February 28, 1965, published almost a month after the decision of the Court of Appeals. Plaintiff's contention that this report reflects "extraordinarily improved earnings" is based on the device of not using the same factors for the periods being compared.[2]

The Invitation itself showed an increase in earnings from $.54 to $.92 per share in the comparable figures for the four months ended December 31, 1963 and December 31, 1964 respectively (an increase of 70%). Comparable figures for the six months ended February 28, 1964 and February 28, 1965 respectively, based upon the number of shares outstanding after the purchase of 1,000,000 shares pursuant to the Invitation to Tender, would show an increase from $1.10 to $1.88 per share (an increase of 71%).

In any event the concept of "full" or even "timely" disclosure does not require a company to forecast its earnings for a period ending one month after the making of its offer to purchase.

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stated in the Invitation for Tenders, the Company's financial statements for its fiscal year ended August 31, 1964, were contained in its Annual Report for that period mailed to shareholders prior to the Annual Shareholders' meeting on December 10, 1964. There was also sent to the shareholders prior to the Annual Meeting a Proxy Statement which had full information as to the shares of the Company owned by Lewis S. Rosenstiel and his "associates." Plaintiff has received Annual Reports and Proxy Statements each year since 1954 when he alleges he became a shareholder. Rule 10(b)-5 does not require that all or any part of this publicly available information be restated in an offer to purchase shares. There is no issue as to the accuracy of any of this information.

[2] $.71 per share attributable to the sale of an investment is a non-recurring capital gain which obviously must be disregarded in measuring the operational earnings trend. Likewise, Schenley's interest in the earnings of Buckingham Corporation, which was acquired on August 31, 1964, cannot be considered since such earnings were not included in the figures for the six months period ending February 28, 1964.

REASONS FOR DENYING THE WRIT

1. The ruling of the Court of Appeals applies a doctrine long established by sound judicial, administrative and legislative action. There is no conflict in the authorities.

The plaintiff, who did not accept Schenley's Invitation for Tenders, was not and is not a seller of securities. In *Birnbaum* v. *Newport Steel Co.*, 193 F. 2d 461 (2d Cir. 1952), cert. denied, 343 U.S. 956 (1952), decided over a decade ago, the Court of Appeals for the Second Circuit held that the rights created by Rule 10(b)-5 "extended only to [a] defrauded purchaser or seller." All the arguments advanced by plaintiff here were expressly rejected by that Court in its opinion by Judge Augustus N. Hand, in which Judge Learned Hand and Chief Judge Swan joined. Indeed, the opinion reads as if it were written for the specific purpose of considering and disposing of plaintiff's contentions in this case and is therefore set out at length (p. 463-64):

> The appellants contend that the applicability of the rule is not limited to the actual purchasers or sellers of securities, but that the general proscription of fraud "upon any person" includes and supplements the common law liability of those who abuse the trust of their corporate positions. They contend that this construction is further supported by the use of the words "in connection with" the purchase or sale of securities; for, if the intent had been to deal with just the purchase or sale of securities, the words "in connection with" are superfluous and would not have been added.
>
> While the Rule may have been somewhat loosely drawn its meaning and scope are not difficult to ascertain when reference is had to the scheme of SEC Regulation and the purpose underlying the adoption of X-10B-5. Prior to its adoption the only prohibitions against fraud in the sale or purchase of securities were contained in Section 17(a) of the 1933 Act, 15 U.S.C.A. § 77q(a), and § 15(c) of the 1934 Act, 15 U.S.C.A. § 78o(c). Section 17(a) of the 1933 Act only made it unlawful to defraud or deceive *purchasers* of securities, and Section 15(c) of the 1934 Act dealt only with

fraudulent practices by security brokers or dealers in over-the-counter markets. No prohibition existed against fraud on a seller of securities by the purchaser if the latter was not a broker or a dealer. Consequently, on May 21, 1942 the SEC adopted Rule X-10B-5 to close this "* * * loophole in the protections against fraud administered by the Commission by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase." SEC Release No. 3230, May 21, 1942. See Note, 59 Harv. L. Rev. 769, 770; Fischman v. Raytheon Mfg. Co., 2 Cir., 188 F. 2d 783, 787, n. 2. The SEC's press release, above quoted, which announced the Commission's adoption of Rule X-10B-5, shows that the Commission was attempting only to make the same prohibitions contained in Section 17(a) of the 1933 Act applicable to purchasers as well as to sellers. That such was the only purpose of Rule X-10B-5 is made abundantly clear when the language of the Rule is compared with the language of Section 17(a); the Commission simply copied Section 17(a), adding the words "any person" in place of "the purchaser" and a final clause "in connection with the purchase or sale of any security."

But the appellants argue that such an interpretation of the Rule is too narrow to carry out the broad purpose of the Act to protect investors "from exploitation by corporate insiders." See Hearings before Senate Comm. on Banking and Currency on S. Res. 84, 56 and 97, 73d Cong., 1st Sess., pp. 6456-6. We do not doubt that Congress was at least partially motivated by such a purpose in enacting the Securities Exchange Act of 1934, 15 U.S.C.A. § 78a et seq. However, the precise question here is whether Section 10(b) of that Act and the Commission's Rule X-10B-5 were the means chosen to further that end, and we are of the opinion that the legislative "history" and "purpose" quoted by appellants are not persuasive that they were. When Congress intended to protect the stockholders of a corporation against a breach of fiduciary duty by corporate insiders, it left no doubt as to its meaning. Thus Section 16(b) of the Act of 1934, 15 U.S.C.A. § 78p(b), expressly gave the corporate issuer or its stockholders a right of action against corporate insiders using their position to profit in the

sale or exchange of corporate securities. The absence of a similar provision in Section 10(b) strengthens the conclusion that that section was directed solely at that type of misrepresentation or fraudulent practice usually associated with the sale or purchase of securities rather than at fraudulent mismanagement of corporate affairs, and that Rule X-10B-5 extended protection only to the defrauded purchaser or seller.

In the years since *Birnbaum*, its ruling has been consistently adhered to.[3] The suggestion of plaintiff that the Second Circuit has withdrawn or modified its ruling in *Birnbaum* is patently contradicted by its most recent approval of the decision in *O'Neill* v. *Maytag*, 339 F. 2d 764 (2d Cir. 1964).

Not only is the construction given by the Seventh Circuit in the instant case supported by the case law and by administrative action (since no attempt has been made by the SEC to amend Rule 10(b)-5), but, in addition, Congress has repeatedly rejected attempts to amend the law to expand the coverage of Section 10(b) beyond sellers and buyers.

Thus, in 1956, bills were introduced in Congress to amend Sec. 10(b) of the Securities Exchange Act of 1934 by adding the phrase "or proposed purchase or sale." S. 3915, H.R. 11,129, 84th Congress, 2nd Session (1956). These bills were not enacted.

In 1957 and again in 1959, similar bills were introduced in Congress to amend Sec. 10(b) of the Securities Exchange Act of 1934 by adding the phrase "or any attempt to pur-

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[3] *Joseph* v. *Farnsworth Radio & Television Corp.*, 198 F. 2d 883 (2nd Cir. 1952); *Brouk* v. *Managed Funds, Inc.*, 286 F. 2d 901 (8th Cir. 1961), cause remanded on suggestion of mootness, 369 U.S. 424 (1962); *Hooper* v. *Mountain States Securities Corporation*, 282 F. 2d 195 (5th Cir. 1960), cert. denied, 365 U.S. 814 (1961); *Keers & Company* v. *American Steel and Pump Corp.*, 234 F. Supp. 201 (S.D.N.Y. 1964); *Kremer* v. *Selheimer*, 215 F. Supp. 549 (E.D. Penn. 1963); and *Donovan, Inc.* v. *Taylor*, 136 F. Supp. 552 (N.D. Calif. 1955).

chase or sell." S. 2545, H.R. 9327, 85th Congress, 1st Session (1957); S. 1179, H.R. 2480, 86th Congress, 1st Session (1959). Again, these proposed changes were rejected by Congress.[4]

It is clear, therefore, that the limitation of the Rule to purchasers and sellers has been consistently adhered to by the courts and Congress. These authorities demonstrate that plaintiff's arguments are neither novel nor meritorious.

The conflict "in principle" which plaintiff purports to find between the decision of the Court of Appeals below and the decisions of other courts does not exist. None of the cases cited by plaintiff are inconsistent with the ruling in *Birnbaum*. None of the cases extends Rule 10(b)-5 to give standing to sue to anyone other than "a defrauded purchaser or seller" of securities.

2. The case is moot

Plaintiff asks this Court to review a judgment of the Court of Appeals dissolving a preliminary injunction which had restrained Schenley from forwarding checks in payment of accepted shares tendered and purchased in response to the Invitation for Tenders and from returning certificates for shares tendered but not purchased.

Plaintiff did not tender his shares. Plaintiff does not and could not seek a rescission of any transaction with defendant Schenley nor any other non-injunctive relief. Insofar as plaintiff suggests a remedy of rescission, he is asserting a claim on behalf of a class of which he is not a member since he did not tender his shares under the Invita-

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[4] See 103 Cong. Record 11636; SEC Legislation, Hearings before a Subcommittee of the Committee on Banking and Currency of the U.S. Senate, 86th Congress, 1st Session (1959) 331. 3 Loss, Securities Regulation (2d ed. 1961), 1424, fn. 6.

tion and his interests as a non-selling shareholder may conflict with those of selling shareholders.[5]

As the plaintiff himself points out in his Petition for Certiorari (p. 9 and p. 24) the transaction has been fully completed. The relief sought by plaintiff has become moot.

If this plaintiff as a stockholder can establish a case of waste or mismanagement in the corporation's purchase of its shares, he may pursue his remedy under Count II. What this plaintiff—neither a purchaser nor a seller—may not do, under the established *Birnbaum* doctrine as properly applied by the court below, is to use Rule 10(b)-5 as a vehicle to enforce a State-law claim of waste or mismanagement that happens to involve a purchase of securities from others.

Plaintiff is here seeking a review of an academic question. It is not this Court's function to give such an advisory opinion. This Court has long held that it will not render decisions on academic or moot questions of law. *Richardson* v. *McChesney*, 218 U.S. 487, 492 (1910); *Brownlow* v. *Schwartz*, 261 U.S. 216, 217 (1923).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Certiorari herein should be denied.

Respectfully submitted,

SIDNEY R. ZATZ
HOWARD ARVEY
MILTON H. COHEN
Attorneys for Respondent

Of Counsel:

PEYTON FORD

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[5] The undetermined complaint in the *SEC* v. *Texas Gulf Sulphur Company* case, CCH Fed. Sec. L. Rep. ¶ 91,520 (1965), has no conceivable factual or legal connection with this case.

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~~No. 1209~~

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JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1964

STANLEY JACHIMIEC, individually and on behalf of all other similarly situated shareholders of SCHENLEY INDUSTRIES, INC.,

Petitioner,

vs.

SCHENLEY INDUSTRIES, INC., a corporation, W. E. BLAKELEY, E. R. DEUTSCHE, THEODORE GOMMI, MILO B. HOPKINS, P. E. LOCKWOOD, JOHN MACKIE, E. S. MONOHAN, J. LINCOLN MORRIS, MILTON J. NAUHEIM, L. B. NICHOLS, LEWIS S. ROSENSTIEL, A. D. SCHULTE, R. G. SMITH and THEODORE C. WIEHE,

Respondents.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR CERTIORARI

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The Scheffer Press, Inc.—ANdover 3-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

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Respondents.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR CERTIORARI.

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1. Respondent's Brief in Opposition does not in any way contest the importance of the questions presented as set forth in the Petition. Its only argument is the contention that the legal principle in the case below (as construed by it) is correct and consistent with previous rulings rather than, as we have argued, that the principle is incorrect and in conflict with previous rulings of this Court and other courts.

2. In respect to the conflict with other rulings we rely on the presentation set forth in our Petition. We assert

that even if it were true (which it is not) that the lower courts in other circuits would be unanimous in adopting the narrower ruling of the court below, the issue presented by this case is, for the reasons stated, of the greatest importance and a pronouncement by this court is required. In addition, as stated on pages 22 to 24 of the Petition, it is clear that the present case is inconsistent with the rulings of this Court and of the Third and Fifth Circuits and that the *Birnbaum case* (193 F. 2d 436), quoted by Respondent at such great length, whatever its authority*, does not apply to the broad denial in this case of plaintiff's standing to sue.

3. This case is in no sense moot. The issue is solely standing to sue for it is clear that if plaintiff has standing to complain of the false solicitation material, the court can and may shape remedies, *e.g.* rescission on the basis of further disclosure, and other remedies set forth in the last paragraph of the Petition (p. 25), as well as additional remedies which may appear appropriate after trial. *J. I. Case Co.* v. *Borak*, 377 U.S. 426. Of course, if Petitioner has no standing, as Respondent contends, then he has no right to complain, but this is not because the case is moot but because the issue in controversy would be a matter of no concern to him.

4. However it is just this issue of standing to sue which is consequential. The issue whether a shareholder-

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* The *Birnbaum* court characterized the situation (193 F. 2d 436, 464) as essentially fraudulent mismanagement of corporate affairs, in contrast to "fraudulent practices usually associated with the sale or purchase of securities."

It does not follow, of course, that even the *Birnbaum* court would have disqualified a shareholder-offeree from suing, since the fact remains that "an offer to purchase" (not involved in *Birnbaum*) is patently an act or transaction "in connection with the purchase or sale of securities."

offeree has a right to complain of a false tender invitation is clearly of great importance; the limitation of standing to sue which the lower court imposed, confining the remedy only to those offerees who blindly accepted the offer, raises the vital questions of public policy which are set forth in detail in the Petition (pp. 14-22).

5. The argument that the tender invitation was not false and misleading underscores the existence of issues to be tried. Respondent argues (Br. p. 4) that the earnings we have called "extraordinarily improved" are arrived at by "the device of not using the same factors" for the periods being compared. The footnote (Br. p. 4) refers to a "nonrecurring" capital gain which "obviously" must be disregarded. It refers also to the interest in the earnings of Buckingham Corporation acquired on August 31. We will not burden the court with rebuttal on the merits. We point out only that these arguments plainly cannot be disposed of on the Complaint alone or by assertions of counsel in opposition to the Petition for Certiorari. They require presentation of testimony and the exploration of the facts as to *e.g.*:

a. When the "nonrecurring" capital gain occurred;

b. What its significance is;

c. What the Buckingham Corporation is;

d. What the reasons are for inclusion or non-inclusion of its earnings; and

e. When, with respect to the time of the tender offer and the delivery of the securities, the "extraordinarily improved" earnings became known to the management.

These considerations are, of course, in addition to the other important factual considerations concerning, *e.g.* the "approaches" to the major stockholders to sell their shares and the extent to which the approaches were "definitive" as to price (Ptn. pp. 8-11). Patently, the facts must be determined on trial by testimony and other evidence and not by argument from the face of the document.

CONCLUSION.

The Petition for Certiorari in this case presents important questions concerning the application of the federal securities laws and should be granted.

Respectfully submitted,

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Washington, D.C.
HOWARD R. KOVEN
SHELDON O. COLLEN
208 South LaSalle Street
Chicago, Illinois
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